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No. 95–695

In the Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH D. RIGGIN, ET AL., PETITIONERS,
v.
OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The Capitol Police Retirement Act, enacted in 1990 and amended in 1994, requires members of the U.S. Capitol Police force to retire upon reaching a specified age provided they have sufficient years of service to qualify for a federal pension. Petitioners present two questions concerning this statute:

1. Whether Congress implicitly repealed this mandatory retirement provision by enacting the Government Employee Rights Act of 1991, which extends the Age Discrimination in Employment Act's general prohibition against age-based employment discrimination to Senate employees, a category that includes members of the Capitol Police force whose pay is disbursed by the Secretary of the Senate.

2. Whether the Court of Appeals erred by deciding Petitioners' claim that this mandatory retirement provision violates the equal protection component of the due process clause of the Fifth Amendment, rather than remanding this purely legal issue to the Senate Select Committee on Ethics, which pursuant to the Government Employee Rights Act of 1991 had reviewed a hearing board's disposition of Petitioners' statutory claim but had affirmed the board's decision that it lacked jurisdiction to address the merits of the constitutional claim.

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BRIEF FOR THE RESPONDENT OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Office of Senate Fair Employment Practices submits this brief in opposition to the petition for a writ of certiorari filed by Kenneth D. Riggin and nine other retired members of the United States Capitol Police.

STATEMENT OF THE CASE

This petition arises out of several claims filed by former Capitol Police officers challenging their involuntary retirement at age 55 pursuant to the Capitol Police Retirement Act ("CPRA"), *codified as amended at* 5 U.S.C. § 8335(d). Using the procedures of the Government Employee Rights Act of 1991 ("GERA"), *codified as amended at* 2 U.S.C. §§ 1201 *et seq.*, the officers filed their claims with the Office of Senate Fair Employment Practices ("OSFEP"). The officers asserted that Congress had implicitly repealed the CPRA's mandatory retirement provisions when, one year after enacting the CPRA, it enacted the GERA, which generally applies the Age Discrimination in Employment Act of 1967 ("ADEA") to Senate em-

ployees. The officers also asserted that the mandatory retirement requirement violates their constitutional right to equal protection of the laws. A hearing board empaneled under the GERA rejected their statutory claim and held that it lacked jurisdiction to consider their constitutional claim. The Senate Select Committee on Ethics, which hears GERA appeals, affirmed. Petitioners then initiated judicial review of the GERA proceedings by filing a petition in the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed on the statutory claim, and, reaching the merits of the constitutional claim, rejected Petitioners' equal protection challenge. This petition followed.

A. The Statutory Framework

1. The CPRA. The CPRA is one of several provisions in the federal civil service retirement laws establishing a mandatory retirement age for certain classes of federal public safety personnel, such as law enforcement officers, air traffic controllers, and firefighters. *See* 5 U.S.C. §8335(a)–(d). As initially enacted in 1990, the CPRA required members of the Capitol Police force eligible for a pension to retire at age 55, unless exempted by the Capitol Police Board. *See* Capitol Police Retirement Act, Pub. L. No. 101–428, §2(b)(1)(A), 104 Stat. 928 (1990). In 1994, Congress amended the CPRA to raise the mandatory retirement age for eligible members of the Capitol Police to 57. *See* Legislative Branch Appropriations Act, 1995, Pub. L. No. 103–283, §307(a), 108 Stat. 1423, 1441 (1994).

Early retirement provisions for federal public safety personnel trace back to 1947, when Congress passed legislation permitting certain FBI officers to retire with an enhanced pension at age 50. *See* Act of July 11, 1947, ch. 219, 61 Stat. 307. In 1948, Congress extended this voluntary early retirement provision to cover most other federal law enforcement personnel—but not the Capitol Police—provided they had rendered twenty years of service. *See* Act of July 2, 1948, ch. 807, 62 Stat. 1221. In 1972, Congress added a similar provision covering federal fire-

fighters. *See* Act of Aug. 14, 1972, Pub. L. No. 92–382, 86 Stat. 539.

Not until 1974, however, did Congress amend the civil service retirement statutes to require that these federal law enforcement personnel and firefighters accept early retirement. *See* Act of July 12, 1974, Pub. L. No. 93–350, 88 Stat. 355. That same year, Congress extended the ADEA's protections to cover most federal employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93–259, 88 Stat. 55, 74–75. Two years earlier, Congress had enacted a mandatory retirement provision for air traffic controllers. *See* Act of May 16, 1972, Pub. L. No. 92–297, 86 Stat. 141, 144.

In 1978, Congress left these specific mandatory retirement provisions intact when, as part of a law further amending the ADEA, it repealed a separate provision in the civil service retirement laws that had required most other federal employees to retire upon reaching age 70. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 189, 191; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 10–11 (1978) (*reprinted in* 1978 U.S.C.C.A.N. 532); *see also Johnson* v. *Mayor of Baltimore,* 472 U.S. 353, 367–68 (1985). Indeed, in the same statute, Congress created an additional mandatory retirement provision applicable to employees of the Alaska Railroad and to employees of what is now called the Panama Canal Commission. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 189, 191. In 1990, Congress further expanded the mandatory retirement provisions by enacting the CPRA, thus applying to the Capitol Police a mandatory retirement system analogous to the system already applicable to other federal law enforcement personnel.

2. The GERA. Petitioners sought relief from the CPRA's mandatory retirement provisions under the GERA. Part of the Civil Rights Act of 1991, the GERA extended the protections of the principal federal employment discrimination laws to Senate employees:

> All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—
>
> (1) race, color, religion, sex, or national origin, within the meaning of [Title VII];
>
> (2) age, within the meaning of [the ADEA]; or
>
> (3) handicap or disability . . .

2 U.S.C. § 1202. Petitioners qualified as Senate employees within the meaning of the GERA because at the time of their retirement they were among those members of the Capitol Police force "whose pay is disbursed by the Secretary of the Senate." *Id.* § 1201(c)(1).

Prior to the GERA's enactment, a Senate rule already provided Senate employees with rights to be free from employment discrimination, but those rights were enforceable only by the Senate Select Committee on Ethics, not in federal court. *See* Senate Standing Rule XLII, *reprinted in Senate Manual,* S. Doc. No. 1, 101st Cong., 1st Sess. 78 (1989); S. Res. 534, 94th Cong., 2d Sess. (1976), *reprinted in Senate Manual, supra,* at 147–48. With the GERA's statutory rights came an entirely new enforcement procedure. First, the GERA created a new office within the Senate, the Office of Senate Fair Employment Practices (OSFEP). *See* 2 U.S.C. § 1203. OSFEP's statutory duties include providing counseling and mediation services to aggrieved employees and empaneling independent hearing boards to adjudicate formal complaints filed with the office. *See id.* §§ 1205–1207. The GERA further provides that an aggrieved employee may seek review of a hearing board's decision by the Senate Select Committee on Ethics, and then may petition for review of the final decision in the United States Court of Appeals for the Federal Circuit, designating OSFEP as the respondent. *See id.* §§ 1208–1209.

B. The Proceedings Below

In 1993, after exhausting the counseling and mediation stages required by the GERA, Petitioners filed formal complaints with OSFEP, alleging that the CPRA's man-

datory retirement provisions violated both the GERA and the equal protection component of the Due Process Clause of the Fifth Amendment. The hearing board concluded that the mandatory retirement provisions are an exception to the general age discrimination prohibition of the GERA, and that the board lacked jurisdiction to consider Petitioners' constitutional claim. Appendix to Petition (hereinafter "Pet. App.") at 38–39 (unpublished decision). The Senate Select Committee on Ethics affirmed the hearing board's decision. Pet. App. at 28 (unpublished decision). Petitioners then sought review in the Federal Circuit, arguing both that the GERA implicitly repealed the mandatory retirement provisions of the CPRA and that the hearing board erred in concluding that it lacked jurisdiction to consider Petitioners' Fifth Amendment claim.

In a unanimous opinion, the Federal Circuit affirmed the hearing board's statutory ruling. Pet. App. at 3–20 (61 F.3d 1563 (1995)). The panel first reviewed the legal principles applicable in resolving a claim that one statute has impliedly repealed another. After reciting the "familiar canon of statutory construction that repeals by implication are disfavored," *id.* at 6 (61 F.3d at 1566), the court explained that it would not find a narrow statute repealed by a subsequent more generalized statute "unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary' in order for the later statute to have any meaning at all." *Id.* (61 F.3d at 1566) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Applying these principles to this case, the Federal Circuit had no difficulty reconciling the CPRA and the GERA. The court wrote:

> Contrary to the petitioners' contention, the GERA is the more general statute and the CPRA is the more specific: the GERA extends employment discrimination statutes to Senate employees generally, while the mandatory retirement provisions of the CPRA speak to a specific employment issue as it affects a specific group of

> congressional employees. Thus, the mandatory retirement provisions of the CPRA simply establish a narrow exception to the general rule, set forth in the GERA, that Senate employees are protected against age discrimination in employment.

Id. (61 F.3d at 1566). The court reinforced this conclusion by describing the parallel relationships between the GERA and the CPRA, on theone hand, and the ADEA and the mandatory retirement schemes for other federal law enforcement personnel, on the other. *Id.* at 8–10 (61 F.3d at 1567–68). The court also noted that Congress' 1994 amendment of the CPRA to raise the mandatory retirement age from 55 to 57 "put to rest" any doubt that the CPRA's mandatory retirement provisions survived the GERA's enactment three years earlier. *Id.* at 10–11 (61 F.3d at 1568).

The Federal Circuit then turned to Petitioners' Fifth Amendment claim "that the mandatory retirement provisions of the CPRA violate the equal protection component of the Due Process Clause." *Id.* at 12 (61 F.3d at 1569). The court concluded that the hearing board had erred in holding that it lacked jurisdiction over this constitutional issue. *Id.* at 13–17 (61 F.3d at 1569–71). The court explained that the hearing board had jurisdiction over this issue for the narrow reason that it "bears directly on whether [Petitioners] have a valid statutory discrimination claim" under the GERA, because if the CPRA's mandatory provisions were unconstitutional, as Petitioners asserted, then the CPRA could not operate to preclude Petitioners' age discrimination claim under the GERA. *Id.* at 13 (61 F.3d at 1569).

However, the circuit court also concluded that it could readily dispose of this constitutional issue without remanding it to OSFEP, noting that "[t]he issue is purely a question of law, and it is within this court's jurisdiction, in reviewing GERA appeals, to 'decide all relevant questions of law and interpret constitutional and statutory provisions.'" *Id.* at 17 (61 F.3d at 1571) (quoting 2 U.S.C.

§ 1209(c)). In the interests of judicial economy, the court elected to do just that. Relying on *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (*per curiam*), and *Vance* v. *Bradley*, 440 U.S. 93 (1979), the court held that the CPRA's mandatory retirement provisions do not deny Petitioners their constitutional right to the equal protection of the laws. Pet. App. at 17–18 (61 F.3d at 1571). The court therefore affirmed the judgment of the hearing board.

C. The Congressional Accountability Act

Petitioners assert (*e.g.*, Petition (hereinafter "Pet.") at 4–5, 9, 13) that this case should interest the Court in part because its resolution bears upon the recently enacted Congressional Accountability Act of 1995, Pub. L. No. 104–1, 109 Stat. 1 ("Accountability Act"), *to be codified at* 2 U.S.C. §§ 1301 *et seq.* The Accountability Act will supersede the GERA, extending to both House and Senate employees the employment and workplace protections of eleven federal statutes, including the nondiscrimination protections that the GERA now extends only to Senate employees. Although the fair employment portions of the Accountability Act, including its age discrimination provisions, will take effect on January 23, 1996, the Act will not affect the instant matter, as a savings provision provides for the completion under the GERA of pending proceedings. *See id.* § 506, 109 Stat. 42, *to be codified at* 2 U.S.C. § 1435.

While the Accountability Act preserves the same substantive protections offered by the GERA, it also creates a process for resolving new employee claims that is wholly distinct from that established under the GERA. For example, under the GERA, the Senate Select Committee on Ethics heard appeals from OSFEP-appointed hearing boards. By contrast, under the Accountability Act no Senate (or House) committee or body will have any role in adjudicating or resolving claims under the Accountability Act. Instead, claimants asserting fair employment claims may elect to have their complaints heard either in federal

district court or by a hearing officer appointed by the Office of Compliance, a newly established independent body in the legislative branch. *See id.* §§ 301, 405, 408, 109 Stat. 24, 33, 37, *to be codified at* 2 U.S.C. §§ 1381, 1405, 1408. A hearing officer's determination may be reviewed in the first instance by the Board of Directors of the Office of Compliance, followed by review in the Federal Circuit, but never by a Senate committee. *See id.* §§ 406–407, 109 Stat. 35, *to be codified at* 2 U.S.C. §§ 1406–1407. A case brought in federal district court may be appealed to the appropriate circuit court.

REASONS FOR DENYING THE WRIT

The petition should be denied because it fails to raise any "compelling" federal question, Sup. Ct. Rule 10, worthy of this Court's attention. The decision below is in harmony with decisions of this Court and of other circuits, and it reflects a proper understanding of the relationship between the GERA and the CPRA. In addition, the Federal Circuit acted well within its discretion in disposing of Petitioners' constitutional claim without a remand.

I. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED LEGAL PRINCIPLES ESTABLISHED BY THIS COURT AND APPLIED BY OTHER COURTS TO SIMILAR ISSUES.

For guidance in addressing Petitioners' claim that the GERA implicitly repealed the CPRA, the Federal Circuit looked to this Court's pronouncements that repeals by implication are disfavored and should be avoided if the statutes can be reconciled. *See* Pet. App. at 6 (61 F.3d at 1566) (citing *Traynor* v. *Turnage*, 485 U.S. 535, 547 (1988); *Radzanower*, 426 U.S. at 154; *Morton* v. *Mancari*, 417 U.S. 535, 549–50 (1974)). The court's conclusion that the narrower CPRA survived enactment of the more general GERA thus involves unremarkable legal principles, and Petitioners do not argue to the contrary.

Rather, Petitioners contend that in reaching this conclusion the Federal Circuit misapplied these settled legal principles. Yet other courts addressing the parallel issue

of the relationship between other federal mandatory retirement requirements and the ADEA's age discrimination prohibitions have analogously reasoned that the ADEA did not invalidate the federal retirement provisions. *See, e.g., Palmer* v. *Ticcione,* 576 F.2d 459, 465 n.7 (2d Cir. 1978) (state retirement law at issue), *cert. denied,* 440 U.S. 945 (1979); *Bowman* v. *Department of Justice,* 510 F. Supp. 1183, 1186 (E.D. Va. 1981), *aff'd,* 679 F.2d 876 (4th Cir.) (table), *cert. denied,* 459 U.S. 1072 (1982); *Bradley* v. *Kissinger,* 418 F. Supp. 64, 68–69 (D.D.C. 1976) (suggesting in dictum that ADEA did not supersede mandatory retirement provision). Indeed, the Federal Circuit expressly relied upon these decisions in reaching its conclusion. *See* Pet. App. at 8 (61 F.3d at 1567). Although Petitioners attempt to disparage these decisions as "old" (Pet. at 6), the analysis in these decisions remains sound. Petitioners have not identified any decisions suggesting that the Federal Circuit's interpretation of the impact of the ADEA on federal mandatory retirement departs from other circuits' interpretations of the relationship of these laws.

Instead, Petitioners argue that this Court in *Johnson* v. *Mayor of Baltimore,* 472 U.S. 353 (1985), left open the question of "the compatibility of the federal mandatory retirement statute with the ADEA." Pet. at 6. Petitioners also claim that "this Court clearly indicated in *Johnson* that the federal mandatory retirement scheme was *not* an exception to the ADEA." *Id.* In fact, however, in *Johnson* this Court made clear that the federal mandatory retirement statutes *were* an exception to Congress' 1978 extension of the ADEA to federal employees. *See* 472 U.S. at 366–70. The Court simply did not question the continuing validity of these provisions.

At issue in *Johnson* was whether Congress' establishment of a mandatory retirement age of 55 for most federal firefighters rendered age a bona fide occupational qualification ("BFOQ"), within the meaning of the ADEA, for non-federal firefighters. The Court concluded that the federal civil service retirement provisions did not estab-

lish a BFOQ, because "factors other than conclusive determinations of occupational qualifications" likely led Congress to enact these provisions. *Id.* at 369–70. But in so finding, the Court expressly acknowledged the existence of "[t]he myriad political purposes" that could "properly" have led Congress to make mandatory retirement for public safety personnel a part of the federal civil service retirement program. *Id.* at 370. The Court also recognized Congress' "uncontested authority to exempt federal employees from the requirements of federal regulatory statutes," *id.*, and summarized the legislative history showing that Congress, when it amended the ADEA in 1978 to make it otherwise generally applicable to federal employees, created just such an exemption by deliberately retaining the mandatory retirement provisions for federal firefighters, law enforcement personnel, and air traffic controllers, *id.* at 367–68 & n.11.

Although the Court in *Johnson* acknowledged the possibility that these federal mandatory retirement provisions might not be consistent with the spirit of the ADEA, *see id.* at 366, the Court also acknowledged Congress' legislative discretion to adopt either more restrictive or more protective legislation for federal employees, *see id.* at 366 n.10. In short, the only issue "left open" in *Johnson* was whether at some future time Congress might ultimately decide to enact statutory amendments to eliminate any of the federal mandatory retirement provisions that Congress had intentionally preserved in 1978 as exceptions to the ADEA. *See id.* at 367–68 & n.11. The Court rightly saw this as a purely legislative decision.

Accordingly, the instant case presents neither a question of law that the *Johnson* decision left unresolved nor a split among the circuits. This Court soundly declines to exercise its certiorari authority where there is "no conflict of decision within the federal system." *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

II. The Federal Circuit Properly Determined That the CPRA's Specific Mandatory Retirement Provisions Were Not Repealed by the GERA's General Prohibition Against Age Discrimination in Senate Employment.

Several years after *Johnson*, Congress enacted the Capitol Police Retirement Act of 1990, thereby extending the principle of mandatory retirement of federal law enforcement personnel to the Capitol Police. At the time, the ADEA did not apply to Senate employees. In 1991, Congress made the ADEA's substantive protections against age discrimination applicable to all Senate employees, including those members of the Capitol Police on the Senate payroll, by enacting the GERA. Petitioners unsuccessfully argued to the hearing board and the Federal Circuit that with this action Congress impliedly repealed the CPRA. Petitioners now raise this argument before this Court (Pet. at 5), relying primarily on portions of the GERA's legislative history in which individual Senators stated generally that the GERA's protections would apply to all Senate employees.

The Federal Circuit concluded that it could readily reconcile the GERA's general protection of Senate employees from a variety of forms of employment discrimination with the CPRA's specific mandatory retirement provisions applicable to members of the Capitol Police. In addition to the principle that repeals by implication are not favored, the court relied on the principle that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of [the] priority of enactment." Pet. App. at 7 (61 F.3d at 1566) (quoting *Morton* v. *Mancari*, 417 U.S. at 550–51). The court explained that the CPRA merely "brought the retirement system for the Capitol Police into line with the retirement systems for other federal law enforcement agencies," *id.* at 8 (61 F.3d at 1567), and added:

> [J]ust as the ADEA does not conflict with or invalidate the mandatory retirement provisions applicable to other federal law enforcement officers, the GERA does not conflict with or invalidate the mandatory retirement provisions of the CPRA.

Id. at 9 (61 F.3d at 1567). The court thus found neither that it was "absolutely necessary" to view the GERA as repealing the CPRA in order for the GERA to have meaning, nor that the two statutes "expressly contradict" each other, as is required to find an implied repeal. *Id.* at 6 (61 F.3d at 1566).

Contrary to Petitioners' claim (Pet. at 5), the Federal Circuit's decision has not "thwarted Congress' will" that the GERA apply universally to all Senate employees. As the Federal Circuit explained, the legislative history Petitioners rely upon shows only that it was Congress' will that the GERA's protections apply to the Senate's legislative employees, as well as to its non-legislative employees. Pet. App. at 11 (61 F.3d at 1568). As the court noted, Congress' legislative enactments since the GERA are probative of Congress' intent that the CPRA remain effective after enactment of the GERA: In 1992 Congress amended the CPRA to authorize certain lump-sum payments of accrued leave to Capitol Police officers facing mandatory retirement under the law, and in 1994 Congress amended the CPRA again to raise the mandatory retirement age for Capitol Police from 55 to 57. *See id.* at 10 (61 F.3d at 1568). These post-GERA amendments to the CPRA "make it plain that Congress did not regard those provisions as repealed by the GERA." *Id.* at 12 (61 F.3d at 1569).

Petitioners also note that, in response to this Court's decision in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), Congress enacted (and eventually permitted to lapse) an exemption from the ADEA for the mandatory retirement schemes of state and local law enforcement agencies. Pet. at 7. But contrary to Petitioners' suggestion, Congress was not required to enact an analogous exemption in order to preserve the federal mandatory retirement provisions, given Congress' obvious intent that these other fed-

eral statutes remain valid. As discussed above (pp. 9–10), this Court in *Johnson* has already recognized this intent.

In short, the Federal Circuit properly concluded as a simple matter of statutory construction that Congress had not repealed the CPRA. The CPRA and the GERA can and should be harmonized, just as this Court in *Johnson* harmonized the other federal mandatory retirement provisions and the ADEA. This case thus presents no compelling federal question regarding the relationship of the CPRA and the GERA worthy of review on writ of certiorari. *See* Sup. Ct. Rule 10.

III. The Federal Circuit Did Not Err in Disposing of Petitioners' Constitutional Claim Without a Remand.

As an independent basis for seeking a writ of certiorari, Petitioners argue that, once the Federal Circuit concluded that the hearing board had jurisdiction over Petitioners' Fifth Amendment claim that the CPRA abrogated their due process right to the equal protection of the laws, then, in deference to the legislative branch and as a matter of "constitutional comity," the court should have remanded that claim to the Senate Select Committee on Ethics. Pet. at 9. (The GERA does not prescribe whether the Committee, the OSFEP hearing board, or OSFEP itself is to receive remands from the Federal Circuit. Although in the ordinary course OSFEP, as the respondent, would receive and dispose of any remand by returning the matter to the hearing board or the Committee as appropriate under the statute, this brief adopts Petitioners' formulation of the issue.) Petitioners suggest that a remand would have furthered the legislative branch's prerogative "to determine matters related [to] its own internal governance." *Id.*

The Federal Circuit's decision to dispose of Petitioners' equal protection claim without a remand to the Senate Select Committee on Ethics was not error. Appellate courts assuredly have the discretion to remand constitutional issues when additional factual development or legal

argument is likely to clarify the precise contours of such issues or to eliminate the need to reach them. However, appellate courts also always retain plenary authority to adjudicate constitutional questions squarely presented. *See* 28 U.S.C. §2106; *Haynes* v. *United States*, 390 U.S. 85, 101 (1968). Because appellate courts are properly concerned with judicial economy, when facing a purely legal issue they may soundly conclude, as the Federal Circuit did in this case, that "the time and effort involved in a remand" are not justified. Pet. App. at 17 (61 F.3d at 1571).

This is especially so when, as here, the issue is "straightforward and simple," *id.* at 17 (61 F.3d at 1571), and similar questions have been previously adjudicated. *See Haynes*, 390 U.S. at 101 (describing a remand as "an entirely needless additional proceeding" when outcome is "inevitably" foreordained). As the Federal Circuit noted, in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (*per curiam*), this Court held that a mandatory retirement requirement for state police officers did not deny them equal protection because the requirement had a rational basis. *Id.* at 314–17. Later, in *Vance* v. *Bradley*, 440 U.S. 93 (1979), the Court similarly held that Congress' imposition of a mandatory retirement age of 60 on federal employees in the Foreign Service retirement system did not deny them equal protection, even though federal employees in the Civil Service retirement system did not face mandatory retirement until age 70, or faced no mandatory retirement at all. *Id.* at 98–112. Relying on these precedents, the Federal Circuit readily and correctly resolved the equal protection issue in this case. Indeed, Petitioners have not challenged the correctness of the merits of this decision. Any error in not remanding this issue therefore would be harmless.

Nonetheless, Petitioners argue that the Federal Circuit should have deferred ruling on the constitutional issue until after the Senate Select Committee on Ethics had considered it. Invoking *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), Petitioners suggest

that something akin to *Pullman* abstention is also justified in this case. Yet in *Pullman,* the controversy involved state law issues that had the potential of obviating the need to resolve the constitutional issue. Here, by contrast, a remand to the Senate Select Committee on Ethics would not have avoided the constitutional issue, but instead would have placed before the Committee the identical constitutional issue that was before the Federal Circuit.

Petitioners also assert that the record was not yet sufficiently developed for the Federal Circuit properly to address the equal protection issue. Petitioners do not explain why additional development of "the precise nature of the due process claims" (Pet. at 9) was needed, but their argument suggests that they desire to challenge the "internal operations" (Pet. at 12) and "policies" (Pet. at 13) by which Congress has implemented the GERA. Yet the Federal Circuit did not hold that the hearing board (and derivatively the Federal Circuit) had jurisdiction over this type of free-standing due process claim. Instead, the court held only that the hearing board had jurisdiction over the limited issue of whether the CPRA violated Petitioners' Fifth Amendment rights to equal protection. This was the only constitutional issue the hearing board had jurisdiction to hear because only this issue had the potential of affecting the merits of Petitioners' GERA-based age-discrimination claim.

Accordingly, regardless of whether under the GERA Congress has, as Petitioners claim, "reserved fact finding and initial determinations for itself," Pet. at 11, the constitutional issue before the Federal Circuit in this case raised a pure question of law that did not implicate the prerogatives of the legislative branch "to govern its own practices and procedures," *id.* This issue instead was ripe for the court's immediate resolution. As the Federal Circuit noted, under the GERA Congress authorized the Federal Circuit to "'decide all relevant questions of law and interpret constitutional and statutory provisions.'" Pet. App. at 17 (61 F.3d at 1571) (quoting 2 U.S.C. § 1209(c)).

Congress' interests simply were not injured by the Federal Circuit's reliance on this authority to reject Petitioners' constitutional claim. Indeed, the alternative in this case would have been a lingering controversy needlessly burdening both the legislative and judicial branches.

To the extent Petitioners maintain that they should have been able to bring some other due process issue before the hearing board, even to this Court they have not articulated "the precise nature" of this claim. Litigants have the burden of articulating their claims with sufficient specificity, and in the absence of such specificity they may not be heard to complain of error regarding how a court has adjudicated those claims. *Cf. Wimm* v. *Jack Eckerd Corp.*, 3 F.3d 137, 142 (5th Cir. 1993) (rejecting appellants' claim that district court decided wrong issue, because appellants did not raise alternative formulation of issue until their second amended complaint, which district court had not permitted to be filed).

In any event, Petitioners' argument that the Federal Circuit erred in not remanding their due process claim to the Senate Select Committee on Ethics simply does not raise a compelling issue worthy of granting a writ of certiorari. Contrary to Petitioners' suggestion (Pet. at 9), once the Accountability Act takes effect next month, the considerations of "constitutional comity" that they posit will become moot, for as described above (pp. 7–8), under the new statute no committee of Congress will have any procedural role in adjudicating employment claims of congressional employees. Instead, these claims will be heard in the first instance either by a hearing officer appointed by the independent Office of Compliance, or in federal district court, and neither the Senate Select Committee on Ethics nor any other congressional committee will take any part in reviewing decisions before they are appealable to the Federal Circuit. Therefore this case at most raises an issue unique to the GERA, a soon-to-be superseded statute, and the writ should be denied. This Court properly declines to exercise its certiorari powers and to expend its resources to resolve issues involving statutory

schemes that have been superseded. *See, e.g., Triangle Improvement Council* v. *Ritchie,* 402 U.S. 497, 498–501 (1971) (Harlan, J., concurring in dismissal of writ of certiorari as improvidently granted); *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73–77 (1955).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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